

FOIA Mandatory Right to OGIS Dispute Resolution Services

**FOIA Advisory Committee Meeting
PUBLIC COMMENT
by Robert Hammond
August 24, 2021**

URGENT NEED FOR RESOLUTION

Mandatory Right to OGIS Dispute Resolution



- The FOIA Improvement Act of 2016 mandates that agencies include in adverse FOIA determinations the right of the requester to seek dispute resolution services from the National Archives and Records Administration (NARA) Office of Government Information Services (OGIS).
- Department of Justice Office of Information Policy (DOJ OIP) has issued guidance that including this right is mandatory.
- ALL posted policy by NARA OGIS and “Advisory Opinion No. 2018-01: Agency Communication with Requesters” states including this right is mandatory.
- Agencies must also notify requesters of their right to seek assistance from OGIS in appeal response letters, pursuant to guidance from the Office of Information Policy at the Department of Justice.
- Agencies must also notify requesters of their right to seek assistance from OGIS in appeal response letters, pursuant to guidance from the Office of Information Policy at the Department of Justice.

NARA’s OGIS Director has issued contrary guidance that including the right to seek OGIS services in adverse determinations is not required, but optional.

NARA OGIS Director Contrary Guidance



“In your July 31, 2021, email, as well as in public comments you have submitted to the Chief FOIA Officers Council, the FOIA Advisory Committee, and the OGIS Annual Open meeting, you request that “ OGIS and/or DOJ issue an advisory stating that statutory language ‘the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and’ must be included in adverse determinations and that the word “ or” does not mean that the Agency can omit “ the Office of Government Information Services” in adverse determinations. We direct you to **OGIS Advisory Opinion 2018-01: Agency Communication with Requesters** (<https://www.archives.gov/ogis/advisory-opinions/2018-01-agency-comms-with-requesters>) where we have previously addressed this issue. Agencies have the option to include either or both the FPL and OGIS in adverse determinations.”

**Yet, OGIS Advisory Opinion 2018-01 states the opposite.
Including OGIS dispute resolution services is mandatory.**

NARA OGIS Director Contrary Guidance Continued



“With regard to dispute resolution services, the FOIA statute is clear: in case of an adverse determination, agencies shall inform requesters of their right “ to seek dispute resolution services from the FOIA Public Liaison (FPL) of the agency **or** the Office of Government Information Services (emphasis added.) ” 5 U.S.C. §§ 5 52 (a)(6)(A)(i)(I)- (III). It appears that [agency] followed the statute correctly by offering FPL services without also including OGIS dispute resolution services.”

**The above statement appears contrary to law
and all posted DOJ and OGIS policy direction.**

DOJ OIP Guidance

THE FOIA IMPROVEMENT ACT OF 2016



Response Letters - New Required Elements for Response Letters

When agencies make their determinations on requests they must offer the services of their FOIA Public Liaison **and** must notify requesters of their services provided by the Office of Government Information Services (OGIS). They must also allow requesters a period of at least 90 days within which to file an administrative appeal. Specifically, agencies **must include** in their notification to the requester:

- “the right of such person to seek assistance from the FOIA Public Liaison of the agency,” and, in the case of an adverse determination:
- the right to appeal within a period of time “that is not less than 90 days after the date of such adverse determination,” **and**
- **“the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services.”**

NARA OGIS Opinion No. 2018-01:

Agency Communication with Requesters



- The FOIA Improvement Act's mandate that Federal agencies alert FOIA requesters to OGIS's dispute resolution services at various points throughout the administrative process has increased our visibility in the FOIA processes ...
- The FOIA Improvement Act of 2016 amended the law to require that when notifying a requester of an adverse determination, agencies **must include information about dispute resolution services provided by the agency and OGIS. 5 U.S.C. 552 § (a)(6)(A)(i).** Agencies must also make information regarding their FOIA Public Liaison (FPL) available, and inform the requester of the right to seek the services of OGIS when notifying a requester that the agency seeks an extension of response time of more than 10 working days due to “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B)(ii).

(link removed) [.archives.gov/ogis/advisory-opinions/2018-01-agency-comms-with-requesters](https://www.archives.gov/ogis/advisory-opinions/2018-01-agency-comms-with-requesters))

OGIS Issue Assessment. Agency Compliance With REQUIRED DISPUTE RESOLUTION NOTICES



- The Freedom of Information Act (FOIA) mandates that the Office of Government and Information Services (OGIS) “shall ... review policies and procedures of administrative agencies ... review compliance ... by administrative agencies; and identify procedures and methods for improving compliance under this section.” See 5 U.S.C. § 552(h)(2).
- The FOIA Improvement Act of 2016 requires that agencies alert requesters to the availability of dispute resolution services when the agency makes an adverse determination during initial processing; and when the agency needs more than 10 additional days beyond the 20-day statutory response time to process in the instance of “unusual circumstances.” In addition, the U.S. Department of Justice’s Office of Information Policy (OIP) has strongly encouraged agencies to notify requesters of dispute resolution services offered by the Office of Government Information Services (OGIS) as a non-exclusive alternative to litigation as part of the agency's final response to administrative appeals.

(See <https://www.justice.gov/oip/blog/foia-post-2010-oip-guidance-notifying-requesters-mediation-services-offeredogis>.)

OGIS Issue Assessment. Continued



- To Assist agencies in meeting their statutory responsibility to alert requesters of dispute resolution services, OGIS and OIP have posted model language on their websites. The model language reflects feedback from agency personnel shared during the July 27, 2017 meeting of the Chief FOIA Officers Council. The model language recommends that agencies provide a mailing address, telephone number, email address, and fax number (if applicable) for agency FOIA Public Liaisons, along with comparable contact information for OGIS. The model language also underscores the importance of providing contact information for the agency FOIA Public Liaison and OGIS in two distinct paragraphs.
- We recommend that agencies use the model language suggested by OIP and OGIS to ensure compliance with statutory notification requirements. Using the model language also ensures the agency is following OIP guidance
- The model language provided by OGIS and OIP is written and formatted to ensure requesters are able to easily identify possible next steps, including ways to contact the agency and OGIS.

DOJ OIP Model Language



For Adverse determinations:

You may contact [optional: the analyst who processed your request and/or the FOIA Requester Service Center, as well as] our FOIA Public Liaison, [name], for any further assistance and to discuss any aspect of your request at:

[Mailing address]

[Telephone number]

[Email address]

[Fax number, if applicable]

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

OGIS Model Language



Model OGIS Language for Agencies to Include in Response Letters

Office of Government Information Services (OGIS) Standard Language to include in Agency Response Letters

The FOIA **requires** agencies to notify requesters of their right to pursue alternative dispute resolution at three points in the Freedom of Information Act (FOIA) process. Please use the updated model language included with the Department of Justice, Office of Information Policy's guidance regarding the new required notification. Below, we duplicated the model language in italics. We have also included model language to include in responses to appeals. If you have any questions, please contact us at ogis@nara.gov or 202-741-5770.

(link removed [.archives.gov/ogis/mediation-program](https://www.archives.gov/ogis/mediation-program))

OGIS Model Language

Initial Determinations



1. Suggested language for initial determination letters

The new law says that in cases of adverse determinations, agencies shall notify requesters of the right of the person to appeal and to “to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services.” 5 U.S.C. § 552 (a)(6)(A)(i)(III).

You may contact [optional: the analyst who processed your request and/or the FOIA Requester Service Center, as well as] our FOIA Public Liaison, [name], for any further assistance and to discuss any aspect of your request at:

[Mailing address] [Telephone number] [Email address] [Fax number, if applicable]

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

OGIS Model Language

Appeals



2. Suggested language for appeal response letters

Agencies must also notify requesters of their right to seek assistance from OGIS in appeal response letters, pursuant to guidance from the Office of Information Policy at the Department of Justice.

The Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, offers services to help resolve disputes between FOIA requesters and Federal agencies.

Office of Government Information Services
National Archives and Records Administration

8601 Adelphi Road--OGIS

College Park, MD 20740-6001

Email: ogis@nara.gov

www.archives.gov/ogis

Telephone (main): 202-741-5770

Telephone (toll-free): 1-877-684-6448

OGIS Model Language

Unusual Circumstances

3. Suggested language for requests in which unusual circumstances allow for 10 additional working days to respond

In cases of unusual circumstances in which the law gives 10 additional working days for agencies to respond, agencies must notify requesters of the right to seek dispute resolution services from the agency's FOIA Public Liaison and OGIS. 5 U.S.C. § 552 (a)(6)(B)(ii). After explaining the nature of the "unusual circumstances" and providing the requester with an opportunity to narrow the scope of a request or to arrange an alternative time for processing:

If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact [optional: the analyst handling your request at ---, or] our FOIA Public Liaison, [name], for any further assistance and to discuss any aspect of your request at:

[Mailing address] [Telephone number] [Email address] [Fax number, if applicable]

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

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Fax: 202-741-5769.



CONCLUSION



1. NARA OGIS Director's policy statements that agencies may offer "FOIA Public Liaison (FPL) services without also including OGIS dispute resolution services" in adverse determinations, and "Agencies have the option to include either or both the FPL and OGIS in adverse determinations" appear contrary to law and all posted DOJ OIP and OGIS policy direction.
2. Mandatory inclusion of the right to seek OGIS dispute resolution services in adverse determinations and throughout the FOIA process has been addressed in the FOIA Advisory Committee, Chief FOIA Officers Council and the Annual OGIS Open FOIA meetings, which are appropriate venues.
3. Mandatory inclusion of the right to seek OGIS dispute resolution services in agency letters is an essential safeguard for FOIA requesters and a compliance requirement for agencies. Immediate resolution is needed.

ACTION SOUGHT



During the September 9, 2021 FOIA Advisory Committee Open Meeting:

1. DOJ's Office of Information Policy and NARA OGIS affirm publicly that it is mandatory for agencies to include in adverse determinations of the right of the requester to seek dispute resolution services from OGIS, then document same in the FOIA Advisory Committee meeting minutes.
2. In the alternative, the FOIA Advisory Committee adopt a resolution for the Archivist of the United States to seek a legal determination of this matter from Congress.

BACKUP



FOIA IMPROVEMENT ACT OF 2016

Revised Duties for OGIS

Revised Duties for OGIS

The duties for OGIS have been revised and new reporting obligations are included.

- OGIS shall “identify procedures and methods for improving compliance” under the FOIA.
- In providing mediation services, OGIS may issue advisory opinions at its discretion or upon the request of any party to the dispute.
- Not less than annually OGIS shall submit to Congress and the President, and make available to the public electronically:
 1. A report on its findings from its reviews of agency policies, procedures, and compliance.
 2. A summary of its mediation services, including any advisory opinions issued and the number of times each agency engaged in dispute resolution with the assistance of OGIS or the FOIA Public Liaison.
 3. Any legislative and regulatory recommendations to improve FOIA.
- OGIS is not required to obtain prior approval of any officer or agency of the United States before submitting to Congress reports, recommendations, testimony, or comments, if such submissions include a statement indicating that the views expressed are those of the OGIS Director and not necessarily the views of the President.
- Not less than annually, OGIS shall hold a public meeting on its activities and “allow interested persons to appear and present oral or written statements.”



FOIA IMPROVEMENT ACT OF 2016

OGIS Dispute Resolution



(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such a request of —

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination —

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and ...

FOIA IMPROVEMENT ACT OF 2016

OGIS Dispute Resolution vs FPL



Whereas only notification of FPL is required if the determination is not adverse, adverse determinations require additional notification of OGIS rights.

shall immediately notify the person making such a request of – [...]

- (II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and
- (III) in the case of an **adverse determination** – ...
- (bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and ...